FILE COPY

No. 482.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

EDWARD JORDAN DIMOCK, as Substituted Executor of the Last Will and Testament of HENRY C. FOLGER, Deceased, and as Executor of the Last Will and Testament of EMILY C. J. FOLGER, Deceased,

Petitioner,

against

WALTER C. CORWIN, late Collector of Internal Revenue, First District of New York.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL MEMORANDUM FOR PETITIONER.

Since the argument of this case and its companion *United States* v. *Jacobs,* 391, counsel for the petitioner, in examining notes taken during the argument of the *Jacobs* case, has found that Mr. Chief Justice Hughes asked a question which had not been answered on any brief and which, according to counsel's recollection, was not directly answered on argument. Counsel therefore requests leave to submit this memorandum for the purpose of supplying the omission.

The question was in substance this: If the effect of *Foster* v. *Commissioner,* 303 U. S. 618, which approved taxation of the survivor's interest in a joint tenancy by

a prospective statute was not to approve taxation of the survivor's interest by a retroactive statute why did this Court cite in its *per curiam* opinion *Tyler* v. *United States*, 281 U. S. 497, and *Gwinn* v. *Commissioner*, 287 U. S. 224?

The answer is as follows:

There are two questions in these cases of the constitutionality of a Federal Estate Tax upon tenancies by the entirety and joint tenancies. The first arises in all cases; the second only where the estate has been created prior to the passage of the taxing act. The first is whether the estate is of such a character that death is the generating source of new rights in the survivor so that a death excise may be levied upon the estate of the decedent. The second is, admitting that the estate is such that death is the generating source of new rights and that therefore the death excise might in the usual case be levied, whether the inclusion of the value of the estate or some certain part thereof in determining the tax base, is not in substance confiscation of a vested interest. The first question is really one of capricious classification; the second is one of the retroactive taxation of a vested interest.

For example, in *Nichols* v. *Coolidge*, 274 U. S. 531, death was clearly the generating source of the rights of the equitable remainderman when the settlor who was the equitable life tenant died, but this Court held that it was unconstitutional confiscation for a retroactive statute to levy an estate tax based upon the interest of the remainderman.

Both the *Tyler* case and the *Gwinn* case involved the question of capricious classification. It was the only question involved in the *Foster* case. Hence the citation of the *Tyler* and *Gwinn* cases in the *Foster per curiam* opinion could only have been for the purpose of indicating that the subjection of the survivor's interest to federal estate taxation was not an unconstitutional classification. The classification would have been constitutional even if the

estate had been created before the taxing act; it would have been the taxing of the vested interest which would have been unconstitutional.

It is true that the *Gwinn* case also involved the question of whether there was retroactive taxation of a vested interest in that it upheld the constitutionality of the taxation of the decedent's half of a joint estate created before the Federal Estate Tax Act but that was not the reason why it was cited in the *Foster* opinion.

Respectfully submitted,

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